

Message Text

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C O N F I D E N T I A L SECTION 01 OF 03 GENEVA 10396

E.O. 11652: GDS

TAGS: UNCTAD, TECH

SUBJECT: UNCTAD - RESULTS OF FINAL EXPERTS MEETING ON CODE
OF CONDUCT FOR TECHNOLOGY TRANSFER

1. SUMMARY: SIXTH AND FINAL EXPERTS GROUP (IGE) ON A CODE
OF CONDUCT ON TECHNOLOGY TRANSFER MADE LITTLE PROGRESS IN
RESOLVING FUNDAMENTAL ISSUES, WITH AN IMPORTANT EXCEPTION
OF NATIONAL REGULATION. IN A STEP FORWARD, THE G-77
TENTATIVELY ACCEPTED CERTAIN PRINCIPLES ON NATIONAL
REGULATION WHICH SERVE TO QUALIFY THE CONCEPT OF PERMANENT
SOVEREIGNTY ESPOUSED IN THE CHARTER OF ECONOMIC RIGHTS
AND DUTIES OF STATES (CERDS). (SIMILAR LANGUAGE, HOWEVER,
HAD BEEN ACCEPTED BY THE G-19 AT THE PARIS CONFERENCE ON
INTERNATIONAL ECONOMIC COOPERATION (CIEC)). OTHER HIGH-
LIGHTS INCLUDED DRAFTING OF A HEAVILY BRACKETED TEXT ON
ENTERPRISE RESPONSIBILITIES AND GUARANTEES, WHICH PRESERVES
B GROUP'S POSITION ON A PARTY'S FREEDOM OF NEGOTIATION
AND COMMON COMMERCIAL PRACTICE. PRINCIPAL DISAPPOINTMENT
WAS A HARDENING OF G-77 OPPOSITION TO PARTY AUTONOMY ON
APPLICABLE LAW/DISPUTE SETTLEMENT. LEGAL NATURE AND
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IMPLEMENTATION MACHINERY WERE NOT DISCUSSED,
ALTHOUGH THERE ARE GROWING INDICATIONS THAT G-77 MAY BE
PREPARED TO ACCEPT A VOLUNTARY CODE AT OUTSET OF
OCTOBER 16-NOVEMBER 10 NEGOTIATING CONFERENCE. (B GROUP
CONFIRMED UNANIMOUS OPPOSITION TO BINDING CODE IN ANY
FORM, INCLUDING A "ZEBRA" CODE.) USDEL MADE STATEMENT
(IN PARA 10) REPEATING CONCERNS ON TIMING OF AND SUB-

STANTIVE PREPARATION FOR CONFERENCE, AND QUESTIONING WHETHER A DETAILED CODE IS A FEASIBLE OBJECTIVE. END SUMMARY.

2. ASSESSMENT - GENERAL IMPRESSION REMAINS THAT THE G-77 HAS A WHOLE DOES NOT ATTACH THE HIGHEST IMPORTANCE TO THE CODE OF CONDUCT; FEW, IT SEEMS, EXPECT AGREEMENT AT THE CONFERENCE. (REPRESENTATION AT NEGOTIATING CONFERENCE IS UNLIKELY TO EXCEED LEVEL OF GENEVA AM-BASSADORS FOR ALMOST ALL COUNTRIES.) G-77 LEADERSHIP AT THE CONFERENCE, HOWEVER, MAY CHANGE, AS A SERIOUS DISPUTE ERUPTED IN ONE OF THE GROUP'S PRIVATE CAUCUSES BETWEEN AFRICAN GROUP AND THE BRAZILIAN COORDINATOR -- WITH FORMER REPORTEDLY CHARGING THAT LATTER WAS TOO MODERATE. BRAZILIAN RESIGNED TEMPORARILY IN CLOSING HOURS OF IGE, AND IT IS UNCLEAR WHETHER BRAZIL WILL LEAD G-77 IN NEGOTIATING CONFERENCE. CHINA PLAYED AN IN-CREASINGLY ACTIVE - AND MODERATE - ROLE IN THE NEGOTIATIONS, WHILE SOVIETS CONTINUED TO PRESS FOR STRONG STATEMENT OF NON-DISCRIMINATION. OUTLOOK FOR AGREEMENT AT CONFERENCE REMAINS SLIM UNLESS B GROUP DROPS CHAPTER ON APPLICABLE LAW, AND U.S. AGREES TO APPLICATION OF CODE INDISCRIMINATELY TO AFFILIATED ENTERPRISE TRANS-ACTIONS. OTHER KEY ISSUES INCLUDE THE DEGREE OF PARTY AUTONOMY IN FRAMING PROVISIONS OF THEIR CONTRACTS, AND THE EXTENT TO WHICH CARTE BLANCHE IS ENDORSED FOR CONFIDENTIAL

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NATIONAL AUTHORITIES CONCERNING EXCEPTIONS TO RESTRICTIVE BUSINESS PRACTICE RULES. USDEL FLOATED INFORMALLY WITHIN B GROUP THE IDEA OF SHIFTING FOCUS OF WORK FROM A CODE TO A GENERAL DECLARATION OF PRINCIPLES IN THE EVENT OF DEADLOCK AT THE CONFERENCE. REACTIONS WERE NON-COMMITTAL BUT INTERESTED.

3. ORGANIZATIONAL MATTERS - B GROUP THUS FAR IS UNABLE TO FIND ANY MEMBER WILLING TO SERVE AS COORDINATOR FOR THE NEGOTIATING CONFERENCE. UNCTAD SECRETARY-GENERAL WILL CONVENE REGIONAL GROUP CONSULTATIONS, AUGUST 29-30, ON PROCEDURAL PREPARATIONS FOR THE NEGOTIATING CONFERENCE. OECD MEMBERS WILL CAUCUS, SEPTEMBER 19-21, IN PARIS TO COORDINATE SUBSTANTIVE POSITIONS FOR THE CONFERENCE.

4. NATIONAL REGULATION - G-77, ABANDONING THEIR POSITION AS ANNOUNCED AT THE END OF 6TH IGE, INDICATED WILLINGNESS TO ACCEPT A FEW PRINCIPLES ADDRESSED TO GOVERNMENTS CONCERNING THE NATIONAL REGULATION ON THE TRANSFER OF TECHNOLOGY. FOLLOWING TEXT OF GROUP B INFORMAL PAPER PRESENTED AT END 5TH IGE, G-77 SPOKESMAN OUTLINED A NUMBER OF CONCEPTS WHICH G-77 COULD CONSIDER. ON BASIS

OF G-77 STATEMENT, B GROUP FORMULATED A NEW
NON-PAPER TAKING INTO ACCOUNT CERTAIN G-77 CONCERNS.
AFTER EXTENSIVE NEGOTIATIONS DURING LAST DAYS OF IGE,
GROUPS DEVELOPED A COMPOSITE, HEAVILY BRACKETED
TEXT TO PRESENT TO NEGOTIATING CONFERENCE. NO AGREEMENT
WAS REACHED ON THE ROLE INTERNATIONAL LAW SHOULD PLAY IN
QUALIFYING SOVEREIGN RIGHT OF STATES TO LEGISLATE IN THIS
AREA. ON SPECIFIC PRINCIPLES G-77 HAS ACKNOWLEDGED,
INTER ALIA, THAT NATIONAL MEASURES SHOULD "PROMOTE A
FAVORABLE ECONOMIC AND LEGAL CLIMATE;" "TAKE INTO CON-
SIDERATION THE LEGITIMATE INTERESTS OF SUPPLYING AND
ACQUIRING PARTIES;" "ALLOW TRANSFER OF TECHNOLOGY TO
TAKE PLACE UNDER MUTUALLY AGREED FAIR AND REASONABLE

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TERMS AND CONDITIONS." NO AGREEMENT WAS REACHED ON
PROTECTING INDUSTRIAL PROPERTY RIGHTS, OR ON HOW CHANGES
SHOULD BE MADE IN NATIONAL MEASURES. LIMITED AGREEMENT
WAS REACHED ON HOW NATIONAL MEASURES SHOULD BE APPLIED,
BUT SUBSTANTIAL DIFFERENCES REMAIN IN LANGUAGE IN
BRACKETED TEXT. CONCERNING THE LIST OF NATIONAL MEASURES,
G-77 AGREED TO ACCEPT A NEUTRAL LIST OF MEASURES PRO-
POSED BY B GROUP IN 5TH IGE INFORMAL PAPER. B
GROUP SUBMITTED FOOTNOTE TO WHOLE
TEXT AND MADE SIMILAR STATEMENT IN FINAL PLENARY EX-
PRESSING ITS VIEW THAT THE CHAPTER WOULD BE CONSIDERED
AS WHOLE AND THAT A NECESSARY BALANCE BETWEEN THE WAY
MEASURES WOULD BE ADOPTED AND THE LIST OF MEASURES THEM-
SELVES WOULD HAVE TO BE STRUCK BEFORE FINAL AGREEMENT ON

WHOLE CHAPTER WAS POSSIBLE.

5. APPLICABLE LAW - NO PROGRESS WAS MADE ON THIS CHAPTER AND DEVELOPMENTS IN THE WG WERE VERY DISAPPOINTMENT TO B GROUP. D GROUP PRESENTED ITS FIRST OFFICIAL PROPOSAL WHICH WAS CLOSELY ALIGNED WITH B GROUP POSITION PARTICULARLY IN AREA OF FREEDOM OF PARTIES TO CHOOSE THE CONFIDENTIAL

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LAW APPLICABLE. HOWEVER, G-77 NON-APER, PRESENTED DURING LAST DAYS OF IGE, REPRESENTED A SUBSTANTIAL HARDENING OF G-77 ORIGINAL POSITION, AND INCLUDED ADDITIONAL PROVISIONS, ADVERSE TO B GROUP INTERESTS, NOT CONTAINED IN ORIGINAL POSITION. G-77 CONTINUES TO INSIST THAT PARTIES CAN HAVE NO FREEDOM TO CHOSE APPLICABLE LAW OR APPROPRIATE FORUM AND THAT CODE WILL SERVE AS BASIC LAW IN SETTLEMENT OF DISPUTES. B GROUP OFFERED A REVISED TEXT (WITHOUT CHANGING SUBSTANCE OF ORIGINAL DRAFT) TO BRING IT CLOSE TO D GROUP, PARTICULARLY IN AREA OF ARBITRATION PROVISIONS. G-77 POSITION WOULD ALLOW ONLY LAW OF ACQUIRING PARTY TO APPLY; INVALIDATE CHOICE OF LAW CLAUSES; RESTRICT FORUMS FOR SETTLEMENT OF DISPUTE TO COURTS OF ACQUIRING PARTY; PERMITS ARBITRATION ONLY IF PERMITTED BY LAW OF ACQUIRING COUNTRY AND ONLY IF PARTIES AGREE TO USE CODE AS APPLICABLE LAW. CHINA STATED THAT IT BELIEVED LAW OF RECEIVING STATE SHOULD NORMALLY APPLY, BUT SUGGESTED THAT ALL GROUPS OUGHT TO "CONSIDER FLEXIBILITY."

6. GUARANTEES AND RESPONSIBILITIES OF ENTERPRISES - NEGOTIATIONS ON GUARANTEE CHAPTER PRODUCED LITTLE AGREEMENT ON SUBSTANCE AND BOTH SIDES PRESERVED BASIC POSITION INTACT. U.S. TEXT SUBMITTED AT OUTSET OF SESSION TO GROUP B WAS LARGELY ADOPTED BY DEVELOPED COUNTRIES AND TABLED IN REPLACEMENT OF ORIGINAL B GROUP TEXT. AFTER CONSIDERABLE DISCUSSION, THIS TEXT, WHICH DEALS WITH NEGOTIATING AND CONTRACTUAL STAGES OF A TRANSACTION, WAS BASICALLY ACCEPTED AS STRUCTURAL BASIS FOR COMPOSITE TEXT. FOLLOWING HARD BARGAINING A COMPOSITE TEXT WITH A LARGE NUMBER OF BRACKETS WAS PREPARED. A FEW NON-CONTROVERSIAL SECTIONS WERE FULLY AGREED. OVERALL ASSESSMENT IS THAT FURTHER DIFFICULT NEGOTIATIONS WITH G-77 WILL BE NECESSARY BUT THAT B GROUP AND U.S. POSTURES ARE RELATIVELY FAVORABLE. CONFIDENTIAL

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IT WILL BE ADVISABLE, IN FURTHER NEGOTIATIONS ON GUARANTEE CHAPTER, TO TAKE INTO ACCOUNT PROGRESS ON APPLICABLE LAW

AND OTHER CHAPTERS.

7. RESTRICTIVE BUSINESS PRACTICES (RBPS) - WORKING GROUP
II HELD FOUR MEETINGS ON THE SUBJECT OF RBPS, TO ATTEMPT TO
REACH FURTHER AGREEMENT, ON THIS IMPORTANT CHAPTER. SUB-
STANTIALLY AGREED TEXT WAS ACHIEVED ON PRACTICES RELATING
TO CHALLENGES TO VALIDITY, RESTRICTIONS ON USE OF PERSONNEL,
EXCLUSIVE SALES OR REPRESENTATION AGREEMENTS, RESTRICTIONS
ON PUBLICITY AND PAYMENTS AFTER EXPIRATION OF INDUSTRIAL
PROPERTY RIGHTS. SINCE TWO PRACTICES MAKE REFERENCE TO
APPLICABLE LAW, IT WAS AGREED THAT THIS FORMAL ACCEPTANCE
WAS CONDITIONAL UPON SATISFACTORY RESOLUTION OF DIFFERENCES
IN THE PROPOSED CODE'S CHAPTER DEALING WITH APPLICABLE LAW
AND NATIONAL REGULATIONS.

8. SOME DISCUSSIONS WERE ALSO HELD ON THE CHAPEAU (PREAM-
BLE) TO THE CHAPTER. GROUP B MAINTAINED ITS PREVIOUS VER-
SION AND DURING THE LAST MEETING GROUP D NOTED ITS SUBSTAN-
TIAL APPROVAL OF OUR TEXT IF ANY REFERENCE TO PARENT-
SUBSIDIARY ENTERPRISE EXCEPTIONS WERE DELETED. NO PROGRESS
WAS ACHIEVED ON REACHING ANY AGREEMENT ON THE CHAPEAU AND
THIS, AS WELL AS OTHER OUTSTANDING DIFFERENCES OF OPINION,
HAD TO BE LEFT FOR THE CONFERENCE IN THE FALL.

9. DEFINITIONS - LITTLE TIME WAS DEVOTED TO THE QUESTION
AT THIS SESSION OF THE IGE. WITHIN B GROUP THE U.S. DEL
MADE CLEAR OUR POSITION THAT THE CODE SHOULD NOT GENERALLY

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APPLY TO AFFILIATED ENTERPRISES, EXCEPT TO THE EXTENT PROPOSED IN THE AREA OF RESTRICTIVE BUSINESS PRACTICES. FOR THE MOMENT, B GROUP RELUCTANTLY WENT ALONG WITH THIS POSITION IN THE FACE OF G-77 AND GROUP D OPPOSITION. WITHIN B GROUP, HOWEVER, MOST DELEGATIONS STRONGLY OBJECTED TO THIS POSITION AND MADE CLEAR THEY WOULD NOT ACCEPT A BROAD EXCEPTION IN THE AREA OF RESPONSIBILITIES/GUARANTEES FOR MULTINATIONAL PARENTS AND THEIR SUBSIDIARIES IN THE FINAL TEXT OF THE CODE. (SUCH A GENERAL EXCEPTION WAS CRITICIZED BY SEVERAL B GROUP MEMBERS, PARTICULARLY THE NORDICS, AS A MEANS FOR THE U.S. TO GAIN A SPECIAL ADVANTAGE SINCE ITS OWN MULTATIONALS TRANSFER THE GREAT BULK OF U.S. TECHNOLOGY EXPORTS.) THIS CONCEPT WHICH HAS IMPORTANT IMPLICATIONS FOR THE RBP AND RESONSIBILITIES/GUARANTEES CHAPTERS WILL CERTAINLY BE A DEVISIVE ISSUE AMONG THE B GROUP AT THE FUTURE CONFERENCE. THE U.S. WAS ONLY ABLE TO GAIN A FIRM STATEMENT OF SUPPORT ON THIS POINT FROM THE UK, ALTHOUGH THE SWISS AND FRG EXPRESSED SYMPATHY WITH OUR POSITION INFORMALLY. NO AGREEMENT WAS REACHED ON OTHER STICKING POINTS OF THIS CONFIDENTIAL

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CHAPTER INCLUDING THE CODE'S APPLICATION TO DOMESTIC TRANSACTIONS WHERE ONE OF THE PARTIES IS FOREIGN CONTROLLED. GROUP OF 77 AND GROUP D DID INDICATE THEIR WILLINGNESS TO ACCEPT A TEST FOR THE APPLICATION OF THE CODE TO TRANSACTIONS BY STATES BASED ON THE "COMMERCIAL NATURE" OF THE TRANSACTION.

10. SPECIAL TREATMENT FOR LDCS - PRINCIPAL OUTSTANDING ISSUE REMAINS WHETHER LDCS SHOULD BE ACCORDED SPECIAL TREATMENT ON AN AGREED OR NON-DISCRIMINATORY BASIS. B GROUP HAS INSISTED THAT A DEGREE OF FLEXIBILITY IN GRANTING SUCH SPECIAL TREATMENT NEEDS TO BE RETAINED. CHAIRMAN OF WG1 CIRCULATED PAPER TO ALL GROUPS BUT THIS PAPER DID NOT PROVIDE SOLUTION. NO REAL CONSIDERATION TO THIS ISSUE WAS GIVEN IN WG DUE TO CONCENTRATION ON OTHER I-SUES.

11. FOLLOWING IS U.S. STATEMENT GIVEN IN FINAL SESSION OF IGE: QUOTE: ON BEHALF OF THE UNITED STATES DELEGATION, I WOULD LIKE TO RECALL FOR THE INFORMATION OF THE DELEGATES TO THE 6TH SESSION OF THE IGE, THE STATEMENT MADE BY THE UNITED STATES AT THE CONCLUSION OF THE 5TH IGE ON THE TIMING OF THE NEGOTIATING CONFERENCE, NOW SCHEDULED FOR OCTOBER 16-NOVEMBER 10. OUR CONCERNS AND RESERVATIONS EXPRESSED IN THIS STATEMENT STILL STAND.

ON A MORE POSITIVE NOTE-WE BELIEVE THAT THE PREPARATIONS FOR THIS CONFERENCE HAVE USEFULLY AND CLEARLY IDENTIFIED THE PRINCIPAL ISSUES IN A CODE OF CONDUCT, AND HAVE SERVED TO HIGHLIGHT THE IMPORTANCE OF THE TRANSFER OF TECHNOLOGY AND THE CONCERNS OF DEVELOPING COUNTRIES IN THIS REGARD. WHILE GRATIFIED BY THE PROGRESS WE HAVE MADE IN THE CHAPTER ON NATIONAL REGULATIONS, WE MUST--IN ALL CANDOR--
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EXPRESS DISAPPOINTMENT AT OUR INABILITY TO RESOLVE MANY OF THE OTHER ISSUES WHICH THUS FAR HAVE EMERGED IN THE COURSE OF PREPARATIONS FOR THE CONFERENCE. WE ARE PARTICULARLY DISAPPOINTED AT THE STATE OF WORK ON THE IMPORTANT QUESTION OF DISPUTE SETTLEMENT AND APPLICABLE LAW.

HOWEVER, GIVEN THE AMBITIOUS NATURE OF THIS DETAILED AND COMPREHENSIVE PROJECT WE HAVE UNDERTAKEN, IT IS PERHAPS INEVITABLE THAT WE WOULD ENCOUNTER DIFFICULTIES -- ESPECIALLY IN LIGHT OF THE COMPLEXITY OF THE ISSUES THEMSELVES, AND THE GREAT DIVERSITY OF COMMERCIAL PRACTICE AND NATIONAL POLICIES AND REGULATION IN THE AREA OF TECHNOLOGY TRANSFER. THIS LEADS US AGAIN TO WONDER WHETHER A CODE WITH THE BREADTH AND DEPTH OF THE KIND WE HAVE BEEN DISCUSSING IS INDEED A WORKABLE, FEASIBLE AND DESIRABLE OBJECTIVE FOR COUNTRIES IN ALL STAGES OF DEVELOPMENT. IN THESE CIRCUMSTANCES, IT IS ONLY LOGICAL IN THE INTERVAL BEFORE THE CONFERENCE TO REFLECT ON WHETHER THERE ARE ALTERNATIVE AND MORE REALISTIC APPROACHES TO ACHIEVING AGREEMENT THAT WOULD PROMOTE THE BASIC OBJECTIVES WE ALL SHARE--THAT IS TO FACILITATE AND EXPAND FLOWS OF TECHNOLOGY AMONG ALL STATES, AND IN PARTICULAR TO DEVELOPING COUNTRIES. END QUOTE.
VANDEN HEUVEL

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